

TRANSCRIBED FROM DIGITAL RECORDING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS LLC, et al.,)	
)	
Plaintiffs,)	
-vs-)	Case No. 10 C 5711
)	
PACKAGING CORPORATION OF)	Chicago, Illinois
AMERICA, et al.,)	February 9, 2012
)	11:05 a.m.
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE NAN R. NOLAN, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs

Via speakerphone:

MR. DANIEL J. MOGIN
The Mogin Law Firm
707 Broadway
Suite 1000
San Diego, CA 92101
(619) 687-6611

MR. STEVEN A. KANNER
MR. ROBERT J. WOZNAK
MR. MICHAEL J. FREED
Freed Kanner London & Millen, LLC
2201 Waukegan Road
Suite 130
Bannockburn, IL 60015
(224) 632-4500

Transcriber:

KATHLEEN M. FENNELL, CSR, RPR, RMR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Suite 2144-A
Chicago, Illinois 60604
Telephone: (312) 435-5569
e-mail: kathyfennell@earthlink.net

1 APPEARANCES: (Continued)

2 For Packaging
3 Corporation of
4 America:
5 Via speakerphone

MR. LEONID FELLER
Kirkland & Ellis LP
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2000

6
7 For International
8 Paper:

MR. NATHAN P. EIMER
Eimer Stahl LLP
224 south Michigan Avenue
Suite 1100
Chicago, IL 60604
(312) 660-7600

10 For Georgia Pacific:

MR. STEPHEN R. NEUWIRTH
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000

14 For Temple-Inland:

MS. BRITT M. MILLER
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

17 For RockTenn:

MR. R. MARK MCCAREINS
Winston & Strawn, LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

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1 (Proceedings heard in open court:)

2 THE CLERK: 10 C 5711, Kleen Products versus
3 Packaging Corporation.

4 THE COURT: Okay. This is Nan Nolan, I'm the
5 Magistrate Judge. Judge Shadur referred the case to us for an
6 evidentiary hearing and for discovery, and based upon a phone
7 call I had with two of the lawyers yesterday and some recent
8 pleadings, we decided we need a procedural status today.

9 So for Kleen Products? On the phone.

10 MR. MOGIN: Yes, your Honor, on behalf of Kleen
11 Products, Dan Mogin.

12 THE COURT: Is it L-O-G -- M-O --

13 MR. MOGIN: M-O-G-I-N.

14 THE COURT: Thank you, Mr. Mogin. Are you on a
15 speaker phone? It's kind of -- it's kind of blanking out.

16 MR. MOGIN: No, your Honor, I'm not.

17 THE COURT: Oh, you're not. Okay, well, good.
18 Anybody else for the plaintiffs on the phone?

19 MR. KANNER: Good morning, your Honor. Steve Kanner
20 and Robert Wozniak on the phone here --

21 THE COURT: Okay.

22 MR. KANNER: -- on behalf of plaintiffs, and I
23 believe your Court has been advised that Michael Freed is
24 currently on a hearing or in a hearing before Judge Gettleman,
25 and as soon as that's concluded, he will be heading directly

1 to your courtroom.

2 THE COURT: Right. And we're sorry we couldn't
3 accommodate Mr. Freed's schedule, but I think when you hear
4 the way we're going to proceed, it will be okay, and we'll be
5 glad to see him when he gets here, okay?

6 MR. KANNER: Thank you very much.

7 THE COURT: Now, we have seven defendants, and, look,
8 let me see my order here. All right, so, no, I didn't bring
9 that right one.

10 So counsel for International Paper is Mr. Eimer and
11 you're here. Good morning, Mr. Eimer.

12 Okay. Packaging Corporation of America.

13 MR. FELLER: Good morning, your Honor, Leonid Feller.

14 THE COURT: Thank you. Okay.

15 Cascades Canada?

16 MS. MILLER: Yes, Cascades could not be here --

17 THE COURT: But you're standing in for them. Good.

18 MS. MILLER: -- on behalf of them.

19 THE COURT: Thank you.

20 International Paper Company?

21 MS. MILLER: That's Mr. Eimer.

22 MR. EIMER: Mr. Eimer.

23 THE COURT: Normac Holdings.

24 MS. MILLER: Norampac, and that's also Cascades.

25 We're here speaking on their behalf.

1 THE COURT: Thank you. And Weyerhaeuser Company.

2 MR. EIMER: I believe they also couldn't be on the
3 phone as well, and we're also authorized to speak on their
4 behalf.

5 THE COURT: Thank you. Georgia Pacific.

6 MR. NEUWIRTH: Good morning, your Honor. This is
7 Stephen Neuwirth from Quinn Emanuel on the phone.

8 THE COURT: Okay. Thank you, sir.

9 Temple-Inland?

10 MS. MILLER: Britt Miller on behalf of Temple-Inland.

11 THE COURT: And RockTenn.

12 MR. McCAREINS: Mark McCareins from Winston & Strawn
13 on behalf of RockTenn.

14 THE COURT: Thank you, sir.

15 Okay. So first of all, I guess my first statement is
16 somewhat of an apology or an explanation of what happened
17 yesterday.

18 On Tuesday, today's Thursday, on Tuesday of this
19 week, we received memos in support of the evidentiary hearing
20 from both sides. As Chris and I were -- Chris -- this is
21 Chris Campbell, my -- one of my permanent clerks who will be
22 working on the case.

23 As we were going through it, it appeared that our
24 evidentiary hearing, which is scheduled for a week from
25 Tuesday, it appears that you folks intend to call five

1 experts. Right prior to yesterday the hearing or currently
2 the hearing is scheduled from 10:00 o'clock to no specific
3 time.

4 This is literally what happened. I said to Chris,
5 don't you think maybe we ought to call one person from each
6 side and see if we should start the hearing at 9:00? I would
7 never have had any kind of a status without including
8 everybody if it was anything other than a ministerial call,
9 and that was the full intention and I have a couple other
10 ministerial issues for today.

11 Within three minutes into the call, the lawyers being
12 the wonderful lawyers they are, they cannot help themself
13 here, we were into substantive issues. We're going back to
14 where I was yesterday.

15 It appeared to me four of the five experts are not
16 from Chicago. You're paying lots of money to have these
17 people here, and I wanted to make sure that we are allowing
18 them sufficient time to help us in this evidentiary hearing.

19 So we're going to go back to, and I'll explain to you
20 the way that I see the hearing, and I would like to start the
21 hearing at 9:00 o'clock.

22 Is there any objection to starting the hearing at
23 9:00 o'clock?

24 MS. MILLER: No, your Honor.

25 MR. MOGIN: Not from plaintiffs, your Honor.

1 THE COURT: All right. You will have -- the
2 plaintiffs will have from 9:00 o'clock till 12:30.

3 We will take an hour break for lunch.

4 From 1:30 to 5:00 o'clock, the defendants will have
5 their time, okay?

6 Now --

7 MR. MOGIN: Your Honor, I'm sorry to interrupt.

8 THE COURT: Tell me who this is.

9 MR. MOGIN: I'm sorry, this is Dan Mogin speaking for
10 the plaintiff, and Mr. Neuwirth can correct me if I'm wrong,
11 but we had had a conference call at your suggestion amongst
12 the lawyers, precisely on the order of proceeding. And while
13 we did do exactly what you just did, divide the time
14 equally --

15 THE COURT: Right.

16 MR. MOGIN: -- we had agreed defendants would go
17 first.

18 THE COURT: Oh, okay, well, that's fine with me. I
19 mean, whatever you want to do is fine with me, and it may be
20 people's plane schedules. That's fine.

21 So defendants will go first, okay, in the morning,
22 and the -- and, you know, that doesn't mean burden, okay?
23 Who's going first at this hearing, I don't want that to have
24 any legal implication; but we will put the defendants' experts
25 on in the morning, plaintiff in the afternoon, okay?

1 Now, here's what I think, and this is what I did say
2 to the lawyers yesterday. There are four issues, and how we
3 began -- four issues that both of you identify as disputed
4 issues kind of to do the background. There may be others,
5 but -- and the first one, from reading Judge Shadur and the
6 main thrust of why the case was referred here, was there is a
7 dispute on what type of search methodology should be used.
8 The defendants would prefer to use a word search, and the
9 plaintiffs would like to use concept searching.

10 Then there are three other preliminary issues, and
11 this is where we started getting all far afield yesterday. I
12 was very candid. While I intellectually understand the
13 difference between a word search and a concept searching, I
14 think this is going to be at least one of the first cases
15 where the judge would pick the search. So I don't have much
16 legal precedent.

17 So I thought experts maybe could help me in trying to
18 solve this kind of unique issue here.

19 The other three issues, if you want to take part of
20 your time and ask the expert while they're on the stand, I am
21 not going to get into prioritizing. You're among the best
22 lawyers I've ever had in front of me. You decide how you want
23 to use your time.

24 And if you want to ask them on -- I mean, the other
25 issues are location of search, I guess that means active,

1 backup tapes, indices and duration.

2 If you think an expert actually tells us or tells a
3 judge what the judge needs to know on those issues and you
4 want to ask a couple questions during your time, that's up to
5 you, okay?

6 So I'm not cutting anybody off, but I am cutting you
7 off after three-and-a-half hours, so ...

8 Then procedurally, I also want to say I'm trying to
9 get a larger courtroom, and so you should look for a minute
10 order if we can get a larger courtroom.

11 Now, are your experts either going to have PowerPoint
12 or exhibits or documents? I can't imagine an expert that goes
13 anywhere without his laptop.

14 MS. MILLER: And we had understood your Honor's order
15 to say that we needed to provide them by the 16th and provide
16 extra copies.

17 THE COURT: Well, that wasn't the question. How are
18 we going to show them?

19 MR. WOZNIAK: Your Honor, Robert Wozniak from Freed
20 Kanner London & Millen.

21 I spoke briefly, at the suggestion of Chris Campbell,
22 to Joe Novack, I believe it is.

23 THE COURT: Yes, yes.

24 MR. WOZNIAK: And advised at least one of our
25 experts, and I assume probably both, would be bringing a

1 laptop and want to show some kind of presentation. And as of
2 now based on your current courtroom, he was planning on
3 bringing in just a very large --

4 THE COURT: Screen.

5 MR. WOZNIAK: -- flat-screen monitor.

6 THE COURT: Right, right.

7 MR. WOZNIAK: A 55-inch plasma, I believe.

8 THE COURT: So --

9 MR. WOZNIAK: Now, I don't know if that would be
10 sufficient based on whatever larger courtroom you get, but --

11 THE COURT: Right. Well, you did your homework.
12 Thank you.

13 So a couple of the courtrooms we're going to try, the
14 newer courtrooms in the building have built-in E-material, so
15 we'll see if we get one of those.

16 Otherwise, is it Mr. Wozniak? We'll let you know, or
17 we'll let Joe know, okay?

18 MR. WOZNIAK: Okay.

19 THE COURT: So that -- I have more though.

20 I also, in this call yesterday, the two lawyers that
21 were on the phone did think it might be helpful to, if the
22 experts have a preliminary report, I know this is very early
23 in the case, if you wanted to, you could give us a copy of the
24 preliminary report.

25 I mean, this was all just being said without even

1 thinking of any ramifications, so I don't know whether or not
2 people want to do that. You can talk among yourselves; but if
3 you wanted to provide it with whatever kind of assurance that
4 everybody understood it was preliminary and couldn't be used
5 at any other point. But if they had any -- I cannot stress
6 enough how interested we are in knowing how their work applies
7 to this case.

8 This is not a Law Review article on what is the
9 better method. This is how will their -- the method that they
10 are suggesting aid you and your clients in this case. So
11 that's what we're -- I mean, I need to know basics, some
12 basics on how you're going to do it, why they're choosing to
13 do it, what are the proportionality burden, yada-yada, why
14 they're picking it, but how it applies to this antitrust case.

15 MR. EIMER: Your Honor, why don't I pick up your
16 suggestion, which is that we talk to the plaintiffs' counsel
17 and see what we can agree to file in advance and --

18 THE COURT: Well, the other thing, though, is -- let
19 me look at this -- okay. You're going to have every
20 opportunity to file post-hearing briefs, materials. The
21 lawyers can come back for oral argument if you want. I'm
22 trying to be efficient on that day.

23 MR. EIMER: Okay.

24 THE COURT: And that was my concern is how can we
25 get, you know, three, four, five, six people on.

1 Defendants, I have a question for you. I want your
2 clients to know that at every step of the way, we are going to
3 give individual consideration to multi-parties. I do and I
4 know Judge Shadur does.

5 At this particular hearing, I am hoping you are going
6 to designate a person who is going to ask, or if you're going
7 to put on your experts, different people are going to put on
8 one expert and that there will not be too much duplication.

9 Again, I can't order you not to do it, but I think it
10 would be more efficient and if somebody hears something and
11 they want to jump up, even if somebody's the lead counsel,
12 they have permission to do that.

13 MR. EIMER: Your Honor, we are coordinating. I think
14 there will be one lawyer who has responsibility for direct and
15 cross-examination --

16 THE COURT: Right. But if you do have something that
17 applies to your clients or your clients' system, I want you to
18 know you can certainly -- and I'm not going to -- on the
19 briefing, the post-briefing, any individual considerations
20 will certainly be taken into consideration, okay?

21 MR. EIMER: Well, I think where the individual issues
22 come up are not with respect to these five witnesses. They
23 come up more with the internal computer systems of the
24 individual defendants --

25 THE COURT: Right.

1 MR. EIMER: -- which will not be part of the
2 testimony taken here. It will be for another time.

3 THE COURT: Right. Well, good.

4 MR. MOGIN: I apologize, your Honor. Mr. Eimer faded
5 out, and I just simply couldn't hear what he said.

6 THE COURT: Okay. We'll ask him to say it again.

7 MR. EIMER: I'll repeat it again. Sorry.

8 What I was saying was that the individual issues that
9 would cause, you know, the breakdown of the joint defense
10 effort in the sense really come up with respect to the burden
11 and the specifics of each particular defendant's computer
12 system, and that will be the subject of evidence or testimony
13 put in by the individual defendants at another time, but not
14 at this hearing.

15 These experts are across the board -- excuse me --
16 dealing with search methodology as the question is being
17 presented.

18 THE COURT: Okay.

19 MR. MOGIN: Just to be perfectly clear, your Honor,
20 we do intend to go the other direction.

21 THE COURT: What is -- what do you mean?

22 MR. MOGIN: In other words, as Mr. Eimer says they're
23 not going to be putting on evidence of that particular type.
24 We do intend, through our computer forensic expert, to put on
25 certain evidence of that type.

1 THE COURT: That's fine. That's what I'm saying to
2 you is you've got your three-and-a-half hours, and as far as I
3 can see, I'm -- I was clear yesterday. I think this is your
4 three-and-a-half hours to put your experts on and you put them
5 on as you choose to do it, okay?

6 MR. MOGIN: Understood, your Honor. Thank you.

7 I just have one further question about the schedule
8 that you've proposed.

9 THE COURT: Uh-huh, sure.

10 MR. MOGIN: Does the three-and-a-half hours include
11 time for each party to engage in cross?

12 THE COURT: Yes.

13 MR. MOGIN: And do you envision the cross and the
14 direct be equally divided as well?

15 THE COURT: No, I'm not going to -- I'm not Judge
16 Posner. I'm not timing you. That's one of our appellate
17 judges who, when he's a trial judge, he times everybody. I'm
18 not doing that.

19 I don't know if somebody takes up the whole
20 three-and-a-half hours, I'm going to assume you're -- you're
21 adults. You're good lawyers. I mean, I'm saying this is what
22 I can offer you.

23 So I do think reasonableness here. I think
24 proportionality here. You can assume that Chris and I are
25 going to be so prepared, I -- I mean, we are going to be very

1 prepared, and what we are trying to figure out is to this case
2 and what we're actually kind of more like Jill come lately is
3 I feel like I'm actually more come lately to the facts of the
4 case than I do to ESI issues, okay? Because I wasn't in the
5 case for the whole year with Judge Shadur.

6 And we're going to read all those. We're going to
7 read antitrust. I'm going to do everything I can so when you
8 walk in, you're going to be talking to somebody who's not as
9 wise as you are, but who is prepared for this.

10 I don't know if I answered your question, sir.

11 You don't know me at all. The lawyers in Chicago
12 have a little bit better idea. I want you to come in and do
13 your work. And we'll have some questions ourselves, but we're
14 going to also modulate ourself, given the three-and-a-half
15 hours.

16 MR. MOGIN: Fully understand, your Honor. Thank you
17 for that explanation.

18 MR. EIMER: Your Honor, in response to Mr. Mogin's
19 statement to the Court, I think I've made this clear, I just
20 want to say it again. Some of our testimony or evidence on
21 the four issues, and really the ancillary three issues to me,
22 will not come through experts but through individual company
23 employees talking about their computer systems.

24 We're not proposing to put that evidence in on the --
25 (inaudible) --

1 THE COURT: Right.

2 MR. EIMER: -- because we already have enough to do
3 that day.

4 THE COURT: But if you have, if predict -- okay. If
5 concept searching, if there is a question that concept
6 searching or word search would have an effect on 1, 2, or 3,
7 rather than calling those people back again, then you might
8 want to ask that question. That's what I'm saying.

9 MR. EIMER: Absolutely.

10 THE COURT: So if there is something where it's going
11 to help our post-hearing briefs or something, then that's why
12 I'm saying that's your call.

13 MR. EIMER: Understood. I think your Honor made it
14 very clear on the call yesterday you want us to get these
15 witnesses in and off in that day and then they're done and not
16 have to recall them, and we will do that.

17 THE COURT: Right.

18 MR. EIMER: That's understood.

19 THE COURT: And it's going to be quite an effort to
20 be able to do that.

21 MR. EIMER: Agreed.

22 THE COURT: Oh, oh, my other thing. I just in
23 complete disclosure here, not -- okay. Complete disclosure,
24 Dan Regard and I did a panel at Georgetown about four years
25 ago. Two years ago, Ken Withers got married in Washington,

1 and Dan Regard had a lovely party, post-wedding party at his
2 house, and I went to Dan Regard's house, okay?

3 It's not going to have an effect on anything, but
4 just so you know that I know who Dan Regard is. I don't
5 know -- interestingly, I didn't know one of the other five. I
6 don't know what that says, but any way -- hi, sir.

7 MR. FREED: Good morning, your Honor. Michael --

8 THE COURT: Freed. I'm so sorry we couldn't wait for
9 you, but this is a ministerial phone call.

10 MR. FREED: (Inaudible).

11 THE COURT: Right. Thank you.

12 And we kind of just basically I said you ladies and
13 gentlemen (loud buzzing noise) I'm running it timewise, we're
14 starting at 9:00 o'clock. 9:00 to 12:30, defendants are going
15 first, not being their burden, this is just by choice. And
16 1:30 to 5:00 o'clock, the plaintiffs will put on their
17 witnesses. No time for argument, but we're going to do
18 post-hearing briefs, and the defendants will have every
19 opportunity to submit individual anything you want about your
20 client.

21 I'm hoping for the hearing the defendants will do --
22 designate someone, but if you can't help yourself, you can
23 jump up and ask a question, okay?

24 We're going to try to be in a bigger courtroom and
25 hopefully one with some IT material.

1 MS. MILLER: Your Honor?

2 THE COURT: Yes, Ms. Miller.

3 MS. MILLER: Do you want -- per Chris's prior e-mail,
4 do you want to see any exhibits and whatnot prior to the
5 hearing? Or just for us to bring them with us.

6 THE COURT: Well, we're closed on Monday, so we
7 didn't know -- see, we have -- Monday is our federal holiday,
8 so if we were going to get anything -- well, I don't -- I
9 mean, is it possible to get it Friday?

10 I mean, do you want to look at it or not or should we
11 just look at it -- it's pretty hard to listen and be reading
12 at the same time though. I mean, if we had them Friday --

13 MR. EIMER: Why don't we try, your Honor, to submit
14 things.

15 THE COURT: Yeah.

16 MR. EIMER: Would Friday be okay? Get it to you
17 Friday or Thursday.

18 THE COURT: Thursday night.

19 MR. EIMER: Thursday night.

20 THE COURT: Then maybe -- because actually Friday is
21 a pretty open day for me, and I could kind of look.

22 MR. EIMER: We'll try and do what we can and if
23 not --

24 THE COURT: And if you don't have them, of course,
25 you can bring them on Tuesday.

1 MR. EIMER: There may be some supplemental ones that
2 we may have.

3 THE COURT: Does that work for people on the phone?

4 MR. MOGIN: I think so, your Honor. I believe -- I
5 couldn't quite hear, but I believe you asked us if we present
6 any exhibits that we intend to offer in evidence by Thursday.

7 THE COURT: Thursday night because we're closed,
8 Monday is Presidents' Day, so if Chris and I were going to
9 look at them over the weekend, that would be good, or Friday,
10 okay?

11 MR. MOGIN: Very good.

12 THE COURT: And I do, if any emergencies come up,
13 you're allowed to, you know, either send an e-mail or call
14 Chris if we need to have an emergency status. You don't have
15 to worry on the three-day notice, okay?

16 MR. EIMER: The parties have a joint though --
17 simultaneous, I guess is the word, simultaneous submission due
18 on Monday. My preference and I think is to focus those
19 submissions on the evidence we expect to go in on the 21st.

20 THE COURT: That would be very helpful. Does that
21 work for you, Mr. Mogin?

22 MR. MOGIN: I don't quite know yet, your Honor.

23 THE COURT: Okay.

24 MR. MOGIN: I'm not sure that I fully grasped what
25 Mr. Eimer was suggesting. Perhaps if I speak to him.

1 THE COURT: That probably would help, right?

2 MR. EIMER: Glad to explain it, your Honor.

3 THE COURT: And then if it works for you, you do the
4 same thing. If it doesn't, you'll give us something else.
5 Okay, all right.

6 Sure.

7 MR. FREED: In terms of the three hours allocated --

8 THE COURT: Three-and-a-half.

9 MR. FREED: Three-and-a-half, will there be any
10 cross-examination?

11 THE COURT: Yes.

12 MR. FREED: There will be.

13 THE COURT: There is, and I don't want to time you,
14 okay? I am not going to time you.

15 I'm assuming, you know, if you get to the issue of
16 how does this apply to the case, which is my main thing I'm
17 hoping the experts are going to talk to us about.

18 Then the cross will help clarify whatever people's
19 positions are.

20 Now, this is in the -- what's going to really happen.

21 MR. EIMER: We'll play it by ear.

22 THE COURT: We're going to try for the one day, okay?
23 We're really trying here, too.

24 MS. MILLER: Thank you.

25 MR. EIMER: Thank you, your Honor.

1 THE COURT: Bye everybody.

2 See you a week from Tuesday. Thank you. Bye-bye.

3 MR. MOGIN: Thank you, your Honor.

4 MR. KANNER: Thank you.

5 MR. WOZNIAK: Thank you, your Honor.

6 (Which were all the proceedings heard.)

7 CERTIFICATE

8 I certify that the foregoing is a correct transcript from
9 the digital recording of proceedings in the above-entitled
10 matter to the best of my ability, given the limitations of
11 using a digital-recording system.

12

13 */s/Kathleen M. Fennell*

February 10, 2012

14

15 Kathleen M. Fennell
Official Court Reporter

Date

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